

The Power, Practice and Process of Commutation of Persons Sentenced to Death

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1. Executive Power

"Clemency is a broad power resting in the executive branch of the government. It includes pardons (which invalidate both the guilt and the punishment of the defendant), reprieves (which temporarily postpone the execution), and commutations (which reduce the severity of punishment). 'Clemency decisions - even in death penalty cases - are standardless in procedure, discretionary in exercise, and unreviewable in result' In most states that have a death penalty, this power rests solely in the hands of the governor who acts alone. Other states use boards of pardons, which may or may not need gubernatorial concurrence to act." Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 Univ. Richmond L.Rev. 289, 289-90 (1993).

"Executive clemency has proved to be the 'fail-safe' in our criminal justice system. . . . It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible." *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

Clemency has been with us as long as the death penalty itself. It existed in ancient Greece, where the Ecclesia (assembly), as the supreme organ of power in the Greek democracy, controlled the dispensation of pardons. Thus, the Ecclesia was empowered to annul the verdicts of the Dicasteries (courts).

The practices and procedures employed by the Ecclesia appear remarkably similar to modern American approaches to clemency. "The prisoner was permitted to appear before the assembly and pled for mercy; friends were permitted to testify on his behalf. Among the reasons for granting pardons were the disclosure of new evidence relevant to guilt, violations of 'due process' as understood at that time, and the widespread popularity of the accused." Note, Executive Clemency in Capital Cases, 39 *NYUL Rev.* 136, 139 (1964), citing Bonner and Smith, *The Administration of Justice from Homer to Aristotle*, 253-56 (1938).

2. Political Consequences of Governors' Grants of Clemency

"[G]ranting clemency does not result in low approval ratings or threaten success in a future election, since nearly all governors who granted clemency received high approval ratings or were re-elected if they sought re-election or higher office." Adam C. Ortiz, *Clemency and Consequences: State Governors and the Impact of Granting Clemency to Death-Row Inmates*, Report of ABA SEC. CRIM. JUST. at 2 (July 2002). <http://www.abanet.org/crimjust/juvjus/jdpclemeffect02.pdf>

"Opportunists will attack a governor's grant of clemency, since it may seem an easy target, but there is no evidence to support the assumption that granting clemency impacts public approval or success at election time." Adam C. Ortiz, *Clemency and Consequences: State Governors and the Impact of Granting Clemency to Death-Row Inmates*, Report of the ABA SEC. CRIM. JUST. at 2 (2002).

"Clemency Boards and Governors are viewed as showing moral strength (91%) if they halt the execution and pursue a second trial or hearing, less than 2% indicate that Clemency Boards and Governors should make this decision based on political pressure, and 80% believe that Clemency Boards and Governors should be held accountable if they knowingly allow a potentially innocent person to be executed in the name of justice." Gary E. R. Schwartz, Ph.D., Linda G. S. Russek, Ph.D., et al., *Clemency Decisions and the Tucker Case: A Preliminary Report on Public Opinion and Concerns*, (1998) at 8 at http://www.straightway.org/karla/az_clemcy.htm.

3. Constitutional Basis

In Kentucky, Section 77 of the 1891 State Constitution gives the Governor power to commute death sentences:

§77. Power of governor to remit fines and forfeitures, grant reprieves and pardons - No power to remit fees. - He shall have power to remit fines and forfeitures, commute sentences, grant reprieves and pardons, except in case of impeachment, and he shall file with each application therefor a statement of the reasons for his decision thereon, which application and statement shall always be open to public inspection. In cases of treason, he shall have power to grant reprieves until the end of the next session of the General Assembly, in which the power of pardoning shall be vested; but he shall have no power to remit the fees of the Clerk, Sheriff or Commonwealth's Attorney in penal or criminal cases.

4. Permissive Statutory Process

A Kentucky Governor can act alone, or the Governor can involve the Kentucky Parole Board, which acts as a clemency board. Under KRS 439.450, the Governor of Kentucky can choose to use the existing Parole Board to investigate and report to him on requests for commutation of sentence:

439.450 - Board to make investigation and report to Governor -On request of the Governor the board shall investigate and report to him with respect to any case of pardon, commutation of sentence, reprieve or remission of fine or forfeiture.

The Governor does not have to use this process, and most of the past commutations of death sentences by Kentucky Governors have apparently not used it.

5. Purpose of the Power of Clemency

The power of clemency is an ancient power, which existed before establishment of this country. In England, the King used the power to ameliorate injustice, or to grant mercy. Clemency "operate[s] as a principled means of correcting some of the flaws extant in our penal system." Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 Tex.L.Rev. 569 (1991).

"Although the reasons for granting capital clemency have varied historically, the executive power to spare prisoners from the death penalty is deeply rooted in Anglo-American criminal law. As one link in the chain of decisions by which the state selects offenders for capital punishment, clemency is functionally integrated with the earlier, judicial stages of the process. Yet the clemency decision also involves the consideration of factors that are not cognizable in the judicial process. Proper exercise of the clemency power requires that the decision-maker have full and accurate information about the offender, the offense, and the needs of society, in order to determine whether to spare the condemned prisoner." *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 Yale L.J. 889, 891-92 (1991).

"Three separate rationales underlying the use of executive clemency can be identified. The first is unrestrained mercy. Clemency is a free gift of the executive, needing no justification or pretense of fairness. The second is a quasijudicial rationale suggesting that governors and clemency officials may consider factors that were not presented or considered by trial judges, juries, or appellate courts. The third rationale is a retributive notion of clemency, which is intended to ensure that only the most deserving among the convicted murderers are executed. This third rationale is the narrowest of the appropriate uses of clemency. Historically, the use of executive clemency has encompassed the broader views of its proper rationales." Michael L. Radelet and Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 Univ. Richmond L.Rev. 289, 290 (1993).

"Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted. *Herrera v. Collins*, 113 S.Ct. 853, 866 (1993).

"States committed to the death penalty must take clemency seriously. This requires an accurate understanding about how clemency operates and is distributed. Quality data and empirical analyses contribute—and, indeed, are essential—to our understanding of clemency, especially its role in the death penalty context. Results from this study uncover critical misperceptions and reveal troubling influences on clemency decisions. Clemency's unique and critical functions and its life and death consequence requires that its application be clear, even-handed, and transparent." Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and its Structure* 64 (Aug. 16, 2002) (unpublished manuscript, on file with author).

6. Diffused Responsibility in the Death Process

No one person or entity is responsible for deciding whether a person should be killed by the state of Kentucky. The ultimate decision-making responsibility is substantially diffused throughout the criminal justice system and the Executive Branch among Commonwealth Attorneys, Assistant Attorney Generals, the Attorney General, jurors, trial judge, appellate judges, victim's family, and the public.

Consideration of clemency by the Chief Executive, however, rests with a single individual and is shared with no one. A Governor is the only person in the death process who has the opportunity, responsibility, and

power to consider all the information, every factor, and all the competing values. No other person has this opportunity, responsibility and power.

"The modern system of capital punishment diffuses and fragments the power to decide who dies. Because the system is composed of multiple actors, no single actor bears the burden of undivided power and responsibility. This division of moral labor tempts actors at the front of the system, such as prosecutors and juries, to convince themselves that later actors will correct any error in judgment they might happen to make. Yet later actors, such as state and federal appellate courts, are in turn disinclined to upset decisions already made and legitimized by a sequence of earlier actors. Where power is divided, responsibility shuffles to and fro in a fatal kind of perpetual motion, never really settling anywhere. In the end, 'nobody actually seems to do the killing: So long as the system's basic architecture remains unaltered, the power to decide who dies will inescapably be dispersed." Stephen P. Garvey, *Politicizing Who Dies*, 101 Yale L.J. 187 (1991).

7. Myth of Thorough Review

There is a myth that condemned inmates' cases are closely and completely scrutinized not only by state courts but also by the federal courts as well through the 9 steps of the post-conviction process. Post-conviction judicial review of capital convictions is much more elaborate today than it was fifty years ago. Virtually every inmate with a realistic execution date has petitioned a federal court for relief at least once. The public perception is that the legal system gives death row prisoners far too many opportunities to complain about unfair trial proceedings.

The reality is much different than the myth. Harsh federal nonretroactivity doctrines, rigid federal procedural default rules, and crippling burdens of proof all conspire to insulate capital cases from full and fair appellate and post-conviction judicial review. Psychologically, judges who review the case subsequent to the trial put inordinate faith in the fairness and reliability of the trial.

"Governors have a heightened degree of responsibility in considering clemency appeals, since there is less review by the courts as the result of the Anti-Terrorism and Effective Death Penalty Act of 1996 and the Supreme Court ruling in *Herrera*." Adam C. Ortiz, *Clemency and Consequences: State Governors and the Impact of Granting Clemency to Death-Row Inmates*, Report of the ABA SEC. CRIM. JUST. at 4 (2002).

While it may be counter-intuitive, it is common for a defendant who has had both state and federal judicial review to have substantial issues which have not been considered on the merits due to some technical mistake by the defendant's attorney. For example, the failure of the attorney to say, "I object" at trial is increasingly a justification of appellate courts to refuse to look at whether or not there was an error.

The law rightly evolves. However, nonretroactivity rulings prevent those sentenced to die to receive the benefit of our more developed understanding of what is needed for fair process and reliable results.

More and more, courts do not consider newly discovered evidence that has significant influence on the issues in a case because courts say it should have been presented earlier.

8. Clemency Nationally

Clemency grants in this country *post-Furman v. Georgia*, 408 U.S. 238 (1972) have occurred with some frequency. Nationally since 1976 there have been 48 commutations of capital defendants sentenced to death. <http://www.deathpenaltyinfo.org/clemency.html#news>. See also, Michael L. Radelet and Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 Univ. Richmond L.Rev. 289 (1993).

9. Kentucky Clemency to Life Without Parole

Clemency has occurred with some frequency in Kentucky capital cases. Since 1920, eight Kentucky Governors have commuted 35 sentences of death to sentences of life imprisonment. The last commutations of death to life occurred in 1967 when Governor Ned Breathitt commuted the death sentences of 3 men.

In some Kentucky cases where the death penalty had been imposed for murder past Governors have commuted those sentences to life "without privilege of parole." Although such a penalty was not authorized by statute, those commutations have survived attack in both the Kentucky and the federal courts. *Hamilton v. Commonwealth*, Ky., 458 S.W.2d 166 (1970) and *Hamilton v. Ford*, 362 F. Supp. 739 (E.D.Ky. 1973).

The commutations signed by Governor Breathitt provide insight into reasons Kentucky governors have granted clemency: the comparison to other prisoners guilty of similar crimes who are serving life sentences, and the opinion that life is a greater deterrence than death.

Many of the Kentucky clemency grants (for defendants Hamilton, Martin, Smith, Jeffries, Bowling, Gray, Lewis, Pearson, Cambrell, Orndorf, McCasland, McPerkins, Williams, Grigsby/Keller, Beckam, Abbott, Johnson, Thomas, Ratliffe) were because of particular facts of the case. Mitigating factors in a case are reasons Kentucky governors have granted clemency: drinking (defendants: Hamilton, Orndorf, Abbott, Sayre, Hughes, Thomas); family background (defendants: Mercer, Gambrel); lack of prior record (defendants: Hamilton, Mercer, Jeffries); mental problems (defendants: Wasson, Douthitt, Garman, Babey).

10. Factors Considered in Grants of Clemency

In their 1993 article, Radelet and Zsembik identify the following historical categories of clemency grants:

- A. Judicial expediency;
- B. Humanitarian reasons; justice-enhancing reasons:
 - 1. Unqualified mercy;
 - 2. Lingering doubt of guilt;
 - 3. Defendant's mental problems;
 - 4. Proportionality, equity;
 - 5. Rehabilitation;
 - 6. Remorse.

Hugo A. Bedau in *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. Rev. L. & Soc. Change 255 (1990-91) sets out nine reasons why capital clemency has been granted over the years:

- 1) "The offender's innocence has been established."
- 2) "The offender's guilt is in doubt."
- 3) "Equity in punishment among equally guilty co-defendants."
- 4) "The public has shown conclusively albeit indirectly that it does not want any death sentences carried out."
- 5) "A nonunanimous vote by the appellate court upholding a death sentence conviction leaves disturbing doubt about the lawfulness of the death sentence."
- 6) "The statutes under which the defendant was sentenced to death are unconstitutional."
- 7) "Mitigating circumstances affecting the death row prisoner's status warrant commutation to a lesser sentence."
- 8) "Rehabilitation of the offender while on death row."
- 9) "The death penalty is morally unjustified."

Other factors which Chief Executives take note of in making clemency decisions include:

- ♣ A reason that only affects this one case.
- ♣ Nature of the crime.

- ♣ Provocation, premeditation, duress, diminished capacity.
- ♣ Prosecutor discretion, misconduct.
- ♣ Juror discretion, misconduct.
- ♣ Judicial discretion, misconduct.
- ♣ Issues not reached on the merits by the courts due to nonretroactivity, procedural default.
- ♣ A Prior offenses.
- ♣ Housed safely, not dangerous in future in prison.
- ♣ Principled motives.
- ♣ Newly discovered evidence, *e.g.*, brain injury.
- ♣ Lack of sufficient resources for counsel at trial.
- ♣ Excessive prejudicial publicity.
- ♣ The trial was fundamentally unfair.
- ♣ There exists geographic unfairness.
- ♣ Ineffective assistance.

11. Legal Developments in the Courts

Several cases indicate unresolved issues and evolving constitutional trends. In *Lackey v. Texas*, 115 S.Ct.1421 (March 27,1995) while the United States Supreme Court denied certiorari on the issue of whether executing a prisoner who has already spent some 17 years on death row violates the 8th Amendment's prohibition against cruel and unusual punishment two justices called for a decision on an unresolved issue. In an opinion in *Lackey*, Justice John Paul Stevens observed that in *Gregg v. Georgia*, 428 U.S. 153 (1976) the Court's; holding that death was a constitutional punishment was grounded in two ways: 1) the sentence was found permissible by the Framers, and 2) it might serve "two principal social purposes: retribution and deterrence." *Id.* at 183.

In *Lackey*, Justice Stevens said, "It is arguable that neither ground retains any force for prisoners who have spent 17 years under a sentence of death...[T]he additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal... As Justice White noted, when the death penalty 'ceases realistically to further these purposes, ...its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernable social or public purposes. A penalty with such negligible returns to the state would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.'" 115 S.Ct. at 1421-23. In *Lackey*, Justice Breyer agreed with justice Stevens that the issue is an important undecided one.

In *Arizona v. Richmond*, 886 P.2d 1329 (Ariz. 1994) (En Banc) the Arizona Supreme Court refused to uphold a death sentence for a man on death row for 20 years. Instead, the Court's reasoning included: 1) the fact that the defendant had been on death row for 20 years, 2) the "law governing capital cases has changed significantly since his initial 1974 sentencing and, apparently, so has Richmond;" and 3) a review of the aggravation and mitigation in the case. The Court reduced his sentence to the most severe existing at the time of his offense - life without possibility of parole for 25 years.

In *Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178 (6th Cir. 1997), *cert. granted* June 27, 1997, an action under 42 U.S.C. §1983, the Sixth Circuit determined that since clemency was an "integral part" of the "overall adjudicative system" that the principle of *Evitts v. Lucey*, 469 U.S. 387 (1985) applied. Under *Evitts*, if a state creates a process which is integral to the system, the process must comply with the demands of fourteenth amendment due process and equal protection.

The Ohio Adult Parole Authority (APA) initiated clemency procedures in this case after the denial of the direct appeal and before state postconviction relief was requested. The APA told Woodard he could have a prehearing interview. Since he had substantial post-conviction remedies available, Woodard was presented with a "'Hobson's choice' between asserting his Fifth Amendment right and participating in the clemency review process." *Woodard* at 1189.

The Sixth Circuit viewed this choice as an "unconstitutional condition;" and required on remand that the district court "employ strict scrutiny in analyzing the challenged condition." *Id.* The Court determined that "unless a compelling reason can be brought forward which counsels against applying the [unconstitutional condition] doctrine;" Woodard has a "colorable unconstitutional conditions claim regarding the interview procedure" *Id.*

Three 1997 McQueen cases unsuccessfully challenged the Kentucky clemency process.

In *McQueen v. Patton*, Ky., 948 S.W.2d 418 (June 27, 1997), a request for declaratory judgment and injunctive relief to stay the execution scheduled for July 1, 1997 before a clemency petition was filed with the Governor, the Court noted that the Governor issued a statement that he would not grant clemency in cases where the death penalty has been recommended by the jury and imposed by the circuit court, and he would not substitute his judgment for that of the legislative, courts and juries. The Kentucky Supreme Court observed that there are "two basic constitutionally mandated requirements under Section 77: 1) that the movant file an application for clemency with the Governor; and 2) that the Governor file with each application a statement of the reasons for his decision." The Kentucky Supreme Court held that despite this announced policy that an application to the Governor for clemency was the "triggering event for action by the Governor; and we will not presume, as does McQueen, that the Governor will refuse to follow the constitutional mandate of §77 in rendering his decision."

In *McQueen v. Patton*, Ky., 948 S.W.2d 121 (June 30, 1997), an action brought after a clemency petition was given to the Governor, the Court held that "the Governor has complied with the requirements of Section 77 of Kentucky's Constitution." In *McQueen v. Patton*, 118 F.3d 460, 465 (6th Cir. June 27, 1997) the Court held that "the decision to grant clemency is left to the Governor's unfettered discretion and the state has not made the clemency process an integral part of the state's overall adjudicative process."

12. Standard for Granting Clemency

What standard. is appropriate for consideration of clemency? In view of the historical and constitutional purposes of clemency, the following standard is offered: *Is there any doubt about the appropriateness of death for this person, is the punishment of death truly fair and commensurate with the defendant's blameworthiness.*

Louisiana Governor Buddy Roemer in commuting Ronald Monroe's death sentence on August 16, 1989 stated, "In an execution in this country the test ought not *be reasonable doubt. The test ought to be is there any doubt?*" *The Advocate*, Vol. 19, No. 4 (July 1997).

13. Death to Life Commutations in Kentucky Since 1920

The following is a chronological listing of the 35 grants of clemency in capital cases by 8 Kentucky Governors from 1920-1967.

GOVERNOR	DATE	DEFENDANT	OFFENSE	REASONS GIVEN IN EXECUTIVE ORDER
Breathitt	12/11/67	Rudolph Hamilton Hassie Cain Martin Johnnie Smith, Jr.	Wilful Murder Wilful Murder Wilful Murder	
Willis	10/09/47	Jack Wright	Wilful Murder	Co-Defendant
	11/03/45	William Elliott	Murder	Conditional; Commutation recommended by court, prosecutor, jurors or other
	01/18/45	Ernest Addington	Rape	Co-Defendant
Laffoon	04/11/35	Stanley Mercer	Wilful Murder	Youth; Good prior criminal record; Personal Aspect of defendant's life
	10/25/34	Houston Jeffries	Wilful Murder	Youth; Good Prior Criminal Record; Particular details of the case; Co-Defendant
	11/08/33	Boone Bowling	Wilful Murder	Characteristics of Victim; Provocation; Commutation recommended by court, prosecutor, jurors or other influential citizens
		Allen Gray	Wilful Murder	Characteristics of Victim; Provocation; Ineffectiveness or Lack of Counsel
	10/18/33	George Lewis	Murder	Characteristics of Victim; Provocation; Personal Aspect of Defendant's Life
	04/05/33	Frank Greshaw	Wilful Murder	Characteristics of Victim; Commutation recommended by court, prosecutor, jurors, or other influential citizens.
	10/13/32	John Wasson	Murder	Psychological Condition of Defendant
Sampson	12/07/31	Oscar Pearson	Murder	Legitimate Claim of Innocence; Co-Defendant
		Ison Gambrel	Murder	Youth; Personal Aspect of Defendant's Life; Commutation recommended by court, prosecutor, jurors, or other influential citizen; Particular details of the case
	12/03/31	William Orndorf	Murder	Particular Details of the Case; Commutation recommended by court, prosecutor, jurors, or other influential citizen; Ineffectiveness or Lack of Counsel
		George McCasland	Murder	Legitimate Claim of Innocence; Commutation recommended by court, prosecutor, jurors, or other influential citizen; Particular details of the case
	12/02/31	Anderson McPerkins	Rape	Legitimate Claim of Innocence
	12/01/31?	? Freeman		
	12/24/30	Lloyd Williams	Wilful Murder	Legitimate Claim of Innocence
		James Grigsby	Murder	Legitimate Claim of Innocence
		John Keller	Murder	Legitimate Claim of Innocence
		Lee Beckam	Wilful Murder	Commutation recommended by court, prosecutor, jurors, or other influential citizen
	12/23/30	Bluford Abbott	Attempted Rape	Conditional; Particular details of the case; Legitimate Claim of Innocence
	9/29/1890	Henry Johnson	Murder	Legitimate Claim of Innocence; Commutation recommended by court, prosecutor, jurors, or other influential citizen
Fields	04/15/24	Sam Archie		
Morrow	12/04/23	Campbell Graham	Murder	Co-Defendant
	06/19/22	Ferdinand Sayre	Murder	Particular details of the case
	05/10/20	Joe Hughes	Murder	Particular details of the case; Commutation recommended by court, prosecutor, jurors, or other influential citizen
	03/23/20	Charles Douthitt	Murder	Personal Aspect of Defendant's Life; Psychological Condition of Defendant; Commutation recommended by court, prosecutor, jurors, or other influential citizen
	??/??/??	A.A. Garman		
Black	12/03/19	Delbert Thomas	Homicide	Personal Aspect of Defendant's Life; Particular details of the case
	11/28/19	Bradley McDaniel	Homicide	Commutation recommended by court, prosecutor, jurors, or other influential citizen
Stanley	??/??/??	Julius Babey	Murder	Psychological Condition of Defendant
	??/??/??	John Ratliffe	Murder	Commutation recommended by court, prosecutor, jurors, or other influential citizen; Legitimate Claim of Innocence